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Peremptory norms of general international law (*jus cogens*) (*continued*)

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Present:

Chairman:	Mr. Valencia-Ospina
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

The Chair invited the Commission to resume its consideration of the third report on peremptory norms of general international law (*jus cogens*) (A/CN.4/714 and A/CN.4/714/Corr.1).

Ms. Galvão Teles said that she shared the Special Rapporteur's view, set out in the syllabus of the topic and repeated in paragraph 20 of the report, that the consideration of the effects and consequences of *jus cogens* was likely to be the most challenging part of the study; as the Special Rapporteur emphasized in the same paragraph, it was also the most important part. In addition, she supported his approach of avoiding theoretical debates. The report had been carefully prepared and drafted and flowed from the aforementioned premises. She supported its general thrust, while believing that some aspects needed to be further analysed and improved.

The Special Rapporteur seemed to be guided by the conviction that any departure from the provisions of the 1969 Vienna Convention on the Law of Treaties would be detrimental to the unity of the international legal order. Hence, he focused in the report on the constant need to maintain consistency with the 1969 Vienna Convention as the main primary source. In her view, he had generally succeeded in preserving several of its delicate balances. However, some aspects needed further consideration, in particular but not only in the areas covered that did not stem directly from the 1969 Vienna Convention or from the Commission's previous work on State responsibility.

On the relationship between the criteria for peremptory norms of international law and the consequences of those norms, it seemed to her that the appropriate reading was a complementary one in which criteria were distinguished from consequences, but to the detriment of neither. Each element had its own function: to identify peremptory norms and then to focus on the particular consequences of their application. Such a complementary reading demonstrated that non-derogability was a criterion for the identification of *jus cogens* norms as well as a consequence of such norms.

In his second report, the Special Rapporteur had stated that the question of who determined whether the criteria for *jus cogens* had been met fell beyond the scope of the topic. In the third report, he mentioned briefly in paragraph 13 that the issue had been raised during the debate in the Sixth Committee at the seventy-second session of the General Assembly. Although it was undoubtedly one of the most important issues relating to *jus cogens*, a narrow reading of the Commission's mandate for the topic would indeed lead to the conclusion that it should be excluded. However, the Commission might be in a position to provide guidance on the issue, which could, in her view, be included in the commentary.

At the same time, besides the possible preparation of an illustrative list of *jus cogens* norms, the added value of the focused consideration of the topic by the Commission, drawing on its previous work on the law of treaties and State responsibility, was indeed to look at the consequences of such norms for other areas of international law, such as individual criminal responsibility; customary international law and other sources of international law or legal acts, such as unilateral acts and resolutions of international organizations; and the settlement of disputes. While practice was not abundant, as stated by the Special Rapporteur and others, especially with regard to the latter instances, it was possible to point to the main consequences. She would therefore concentrate in her remarks on the proposed draft conclusions that went beyond the legal regime of *jus cogens* set out in the 1969 Vienna Convention and in the articles on responsibility of States for internationally wrongful acts and that needed to be more carefully examined, namely draft conclusions 14 to 18, 22 and 23.

With regard to the structure and basic approach of the report, she agreed that the proposed draft conclusions should be divided into different parts and took the view that that task should be undertaken by the Drafting Committee at the current session. There were different possible ways of dividing them, but in her view the structure should be based on

essentially three types of consequences that flowed from *jus cogens* norms: the nullity of legal acts arising from treaties or other sources of international law that were incompatible with or in conflict with *jus cogens* norms; the consequences of the breach of such norms; and other consequences. Regarding draft conclusions 10 to 13, which dealt with the consequences of *jus cogens* with regard to treaties, she suggested, as Mr. Murphy had done, that they should follow more closely the structure and content of articles 53, 64 and 71 of the 1969 Vienna Convention; articles 31 and 44 should likewise be taken into account. Those changes could also be made by the Drafting Committee at the current session. The wording of draft conclusions 19 to 21, which addressed the consequences of *jus cogens* in terms of State responsibility, should also be brought into line with the relevant provisions of the 1969 Vienna Convention; in particular, as pointed out by Mr. Murphy and Mr. Nolte, the word "serious" should be added to qualify the word "breach" in draft conclusion 21. The Commission should also consider the potential need for a separate draft conclusion addressing further the issue of countermeasures in connection with article 50 (1) (d) of the articles on State responsibility, as proposed by, for example, Mr. Park and Ms. Lehto.

Draft conclusion 14 was an important one, especially given the lack of an objective system for determining the existence and consequences of peremptory norms of general international law. However, the provisions of the 1969 Vienna Convention on which the draft conclusion was based established a complex system that, unlike the draft conclusion, included all means of peaceful settlement of disputes, not only submission to the International Court of Justice and arbitration. At the same time, not all States were parties to the 1969 Vienna Convention, and many States had formulated a reservation concerning article 66 thereof, as Mr. Park had mentioned. She therefore suggested that paragraph 1 of the draft conclusion should be reformulated in order to include a reference to other means of peaceful settlement of disputes, as mentioned in article 65 (3) of the 1969 Vienna Convention. Mr. Nolte had made an interesting proposal in that regard that merited consideration by the Drafting Committee. Paragraph 2, in her view, should be reformulated as a "without prejudice" clause with respect to the rules concerning the jurisdiction of the International Court of Justice, rather than stating that the fact that a dispute involved a peremptory norm was not sufficient to establish the jurisdiction of the Court.

Draft conclusions 15, 16 and 17 provided for the invalidity or nullity of other sources of international law besides treaties — namely custom, unilateral acts and resolutions of international organizations — where those sources conflicted with *jus cogens*. Perhaps, as mentioned by other members, general principles of law should also be included among those sources.

Regarding draft conclusion 15, there had been discussion, reflected in the literature, as to whether rules of customary international law could conflict with *jus cogens* and what the consequences of such a conflict should be. She agreed with Mr. Park on the need to understand better the meaning of "conflict" in that context. Authors such as Kolb and Tomuschat had argued that a customary international law rule could not arise if it conflicted with *jus cogens*, which seemed to be the position taken by the Special Rapporteur in the draft conclusion. A different position had, however, been taken by Judges Rozakis and Caflisch in the case of *Al-Adsani v. the United Kingdom* before the European Court of Human Rights. In paragraph 1 of their joint dissenting opinion, they had stated: "For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule." She shared that point of view and believed that it applied to customary international law rules. Like Mr. Saboia and other members, she supported the proposition set out in paragraph 3 of the draft conclusion regarding the persistent objector rule.

She also supported draft conclusion 16 and agreed that the Drafting Committee could work on refining the wording.

With regard to draft conclusion 17, her position was similar to the position that she had expressed regarding draft conclusion 15. It was not a matter of whether or not

resolutions established binding obligations but whether they were rendered void or failed to produce legal effects if they conflicted with a *jus cogens* norm, as Mr. Šturma had seemed to indicate. At the same time, she agreed that the draft conclusion could be formulated in a more general way, covering all relevant resolutions of international organizations, with the special situation of Security Council resolutions being explained in the commentary. Other members, including Mr. Saboia, Mr. Murphy and Mr. Nolte, had also made relevant comments questioning the reference to Security Council resolutions.

She agreed with the inclusion of draft conclusion 18 but took the view that it needed to be rephrased in order to better reflect the relationship between *jus cogens* norms and obligations *erga omnes*, and also the consequences arising from them. She suggested two alternative formulations. The first was based on the current wording proposed by the Special Rapporteur, which would be changed to read: "Peremptory norms of general international law (*jus cogens*) establish obligations *erga omnes*, regarding which all States have a legal interest in their protection." The second, which was closer to paragraph 33 of the judgment of the International Court of Justice in the case concerning the *Barcelona Traction, Light and Power Company, Limited* and to paragraph 10 of the commentary to article 48 of the articles on State responsibility, would read: "Peremptory norms of general international law (*jus cogens*) establish obligations *erga omnes* regarding which each State is entitled to invoke the responsibility of another State for breach of such obligations." Mr. Murphy had suggested similar wording.

She supported draft conclusion 22 for the reasons given by the Special Rapporteur and also, in particular, by Ms. Lehto.

As to draft conclusion 23, she supported paragraph 1 but believed that the wording could be improved by the Drafting Committee. She agreed with the proposed text of paragraph 2 and favoured its referral to the Drafting Committee; however, given its close link to the topic "Immunity of State officials from foreign criminal jurisdiction", she concurred with Mr. Jalloh and Mr. Vázquez-Bermúdez that its consideration by the Drafting Committee should be suspended until the first reading of the draft articles on immunity had been completed.

With regard to future work on the topic, she supported the Special Rapporteur's suggestions concerning an illustrative list of *jus cogens* norms and the question of regional *jus cogens*, as set out in paragraph 162 of his report.

She was in favour of referring all 14 proposed draft conclusions to the Drafting Committee, which should of course take into account the foregoing remarks and the other suggestions made in the plenary. She agreed that the Commission should finish the first reading of the draft conclusions at its next session.

Mr. Hassouna said that the report was clear, well structured and well researched, and provided the Commission with rich material on which to base its discussions. Although the length of the report went well beyond the recommended limit, that could be overlooked thanks to its valuable content and thorough analysis of the consequences of *jus cogens*.

As evidenced by the debate both in the Commission and in the Sixth Committee, the concept of *jus cogens* was a source of substantial controversy. As early as 1969, at the time of adoption of the Vienna Convention, it had been deemed an obscure term for an obscure notion, and that sentiment seemed to remain largely unchanged. During the United Nations Conference on the Law of Treaties, many delegations had expressed the view that the effect of peremptory norms was to impose limitations on the contractual will of States. Other delegations had viewed *jus cogens* as an essential organizational tool for the international community, necessary to maintain stability and legal certainty and to strengthen the rule of law in international relations. Delegations had repeatedly emphasized that peremptory norms served the interests of the international community as a whole, as opposed to the needs of individual States.

It was clear from the report that, during the most recent debate in the Sixth Committee, most States had continued to express support for the Commission's consideration of the topic, while a few States had continued to express concern. During the Commission's debate at the current session on the consequences of peremptory norms of

general international law, members had expressed divergent views on a number of issues. In his opinion, it was important for the Special Rapporteur to take all the different concerns and viewpoints into consideration, as that would help to achieve the Commission's aim of clarifying the concept of *jus cogens* from an international law perspective.

He agreed that the effects and consequences of *jus cogens* were the most challenging and the most important aspect of the topic. He fully supported the Special Rapporteur's methodological approach of avoiding theoretical debates and instead conducting a thorough analysis of State practice in all its forms, judicial practice, literature and any other relevant material. He further supported the Special Rapporteur's decision not to adopt any particular systematic approach but rather to focus on those potential consequences of *jus cogens* that had most often been identified and that raised important practical problems for States and for international and national courts.

With regard to proposed draft conclusions 10 and 11, the use of the terms "void" and "invalid" should be clarified by the Special Rapporteur. Under the 1969 Vienna Convention, the terms were not interchangeable: the drafting history showed that the Commission had deliberately selected "void" and "invalid" to serve in different contexts. The distinction between the two terms centred on the grounds for invalidity: "invalid" implied State consent, while "void" referred to the legal status of an improperly concluded treaty, regardless of the grounds for invalidity. On that basis, he took the view that the word "void" should be used in the draft conclusions where the grounds for invalidity did not turn on State consent.

The term "conflict" was used in a number of the proposed draft conclusions, yet there was no definition of it in the report. In his view, such a definition would be required by States invoking the draft conclusions and by courts or other bodies that were deciding whether a conflict existed.

In paragraph 30 of the report, it was stated that some writers had noted cases of invocations of invalidity of treaties on account of conflict with *jus cogens*. For example, one writer had suggested that the African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights were invalid on the grounds that they were in conflict with the *jus cogens* norm of self-determination. That suggestion was misleading and lacked credibility; in the Arab Charter on Human Rights, for example, the right of self-determination was referred to both in the preamble and in article 2.

Noting that paragraph 3 of draft conclusion 10 provided that treaties should, as far as possible, be interpreted in a way that rendered them consistent with *jus cogens*, he said that the commentary should emphasize that such interpretation should not override the interpretative rules enshrined in the 1969 Vienna Convention or customary international law.

It should be made clear in the commentary that draft conclusion 13 was based on the relevant guideline from the Guide to Practice on Reservations to Treaties, but also, as mentioned by others, that the wording was not identical.

With regard to unilateral acts that were in conflict with *jus cogens*, as referred to in draft conclusion 16, the meaning of the term "unilateral act", and whether it included unilateral acts of international organizations, should be clarified. It should also be emphasized that the draft conclusion related only to formal unilateral acts that created legal obligations as opposed to any type of act undertaken unilaterally.

Noting that draft conclusions 19 to 21 were based on articles 26 and 41 of the articles on State responsibility, he said that they should be further harmonized with all the articles on State responsibility related to *jus cogens*. Moreover, since the obligations that applied to States, including the duty to comply with peremptory norms, also applied to international organizations, the obligations of those organizations should be examined in order to clarify any distinctions between them and the obligations of States.

Turning to draft conclusion 15, he noted that, in paragraphs 1 and 2, the principles set out in articles 53 and 64 of the 1969 Vienna Convention were applied to the customary international law context. The Special Rapporteur convincingly advocated support for the two paragraphs by stressing the superior standing of *jus cogens* norms in the hierarchy of

international law. Though the examples provided in the report contained different wording, the premise was the same. The content of the two paragraphs was supported by State practice and the decisions of national and regional courts, such as a 2011 judgment of the High Court of Kenya, in which the Court had emphasized that *jus cogens* norms rendered void any other pre-emptory rules which came in conflict with them.

With regard to paragraph 3 of the draft conclusion, the non-applicability of the persistent objector doctrine to *jus cogens* norms was grounded in case law, commentary and logic; the doctrine stood in direct opposition to the universal application of *jus cogens* norms. Some writers had commented that the clash between the underlying functions of *jus cogens* and the persistent objector rule could be resolved by emphasizing the pre-eminence of *jus cogens* norms.

Draft conclusion 17 was one of the more controversial of the proposed draft conclusions, and consideration of it was made more difficult by the paucity of State practice. However, its content was particularly important, since binding determinations in Security Council resolutions, like *jus cogens* norms, had the unique characteristic of being hierarchically superior to other rules. In addition, Article 103 of the Charter of the United Nations provided that obligations under the Charter prevailed over obligations under any other international agreement. It should also be remembered that, in spite of its prominent position, the Security Council was constrained by the provisions of the Charter; as the International Court of Justice had emphasized in its 1948 advisory opinion on *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*: "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment." In particular, the Council must, under Article 24 (2) of the Charter, act in accordance with the purposes and principles of the United Nations; under Article 1 (1), one of the purposes was to bring about a resolution of international disputes by peaceful means and in conformity with the principles of justice and international law. More recently, the question of compatibility of Security Council resolutions with international law had been considered by the International Court of Justice in the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, brought before the Court in 1992.

With that background in mind, the Special Rapporteur convincingly suggested that Security Council resolutions were subject to *jus cogens* norms and the principles and purposes of the United Nations, as set out in the Charter, some of which might themselves constitute *jus cogens*. He found support for his view in the positions taken by a number of States, decisions adopted by national, regional and international courts, and the conclusions of the work of the Study Group on fragmentation of international law. In reality, as suggested by the Special Rapporteur, it was highly unlikely that the Security Council would adopt a resolution that, on the face of it, was in conflict with a peremptory norm of international law; if such a case arose, the Vienna rules of interpretation would become relevant. However, the International Court of Justice, in its 2010 advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, had stated that, although those rules might provide guidance, the interpretation of Security Council resolutions might require other considerations to be taken into account. In any event, he agreed that interpretation should, to the extent possible, be consistent with general international law, including *jus cogens*, as provided in paragraph 2 of the draft conclusion.

He agreed with the suggestion made by the Special Rapporteur in his oral introduction that the draft conclusion could be reformulated to refer to resolutions in general as opposed to binding resolutions, so as to make it clear that, to have legal effect, all resolutions must be consistent with *jus cogens*, even if they were not binding. The wording proposed by the Special Rapporteur could be expanded further by including a reference to other decisions that had legal effects.

Turning to draft conclusion 22, he noted that paragraph 1, in which it was asserted that States had a duty to exercise jurisdiction over crimes prohibited by *jus cogens*, was modelled on draft article 7 of the draft articles on crimes against humanity. Such a duty would have an impact on State sovereignty in that States would be compelled to exercise

national criminal jurisdiction over all crimes prohibited by *jus cogens* that were committed by their nationals or on their territory. According to the Special Rapporteur, it was generally accepted that there existed a duty to prosecute; however, the analysis provided in the report did not support that conclusion. As evidence of State practice, the Special Rapporteur cited various conventions and national laws prohibiting crimes that constituted violations of *jus cogens*. However, the existence of those laws did not necessarily reflect a recognized duty under customary international law because they did not provide evidence of the requisite *opinio juris*. For example, the national laws mentioned in support of an obligation to prosecute the crime of genocide were all laws of States that were also parties to the Convention on the Prevention and Punishment of the Crime of Genocide. Those States could have adopted their national laws on the basis of their treaty obligation to do so, or on the basis of other national considerations. The International Court of Justice had found that the existence of national legislation constituted State practice, but it generally looked for acknowledgement that the practice was undertaken out of a sense of legal obligation. It was understandably difficult to establish *opinio juris* in the current context, since it was nearly impossible to ascertain the intent behind the enactment by States of national legislation. In his view, therefore, further exploration of State practice was needed. Even if there was no duty to exercise jurisdiction over such crimes, paragraph 1 of the draft conclusion could be reformulated as a recommendatory provision. As to paragraph 2, it was correctly phrased as a "without prejudice" clause and should be retained as such to allow for the potential exercise of universal jurisdiction, as discussed by the Special Rapporteur in paragraph 118 of the report.

With regard to draft conclusion 23, in his view the report was rightly aimed at covering all practice on *jus cogens*, including in relation to immunity *ratione materiae*. Although the proposed draft conclusion was inherently controversial in that it was based on draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction, the Special Rapporteur had taken a comprehensive approach to the issue and had produced a thorough analysis, which was set out in paragraphs 121 to 132 of the report. The difficult nature of the subject was reflected in a recent judgment of the Supreme Court of Appeal of South Africa, in which the Court had found that there was no exception to immunity *ratione materiae* on the basis of *jus cogens* and had quoted the following observation of Professor John Dugard in that regard: "customary international law is in a state of flux in respect of immunity, both criminal and civil, for acts of violation of norms of *jus cogens*". The difficult nature of the subject also explained the differing views expressed by Commission members in the current debate and by States in the Sixth Committee concerning draft article 7 of the draft articles on immunity as provisionally adopted by the Commission. Some States had generally favoured draft article 7, while others had opposed it, had expressed reservations or had called on the Commission to revisit it and clarify it.

Although he supported the proposed draft conclusion in principle, he believed that a more balanced approach might be struck, taking into consideration the concerns raised by States and by some Commission members in the context of the topic of immunity, and also the views of those States and members that favoured exceptions to individual criminal responsibility. Such an approach would consist in narrowing the scope of the draft conclusion and adding a list of applicable crimes. The exceptional nature of the non-applicability of immunity could then be stressed in the commentary. However, most importantly, the Commission should ensure that its discussion of immunity in the context of the draft conclusion and the outcome of that discussion were consistent with its approach to dealing with the topic of immunity and the topic of crimes against humanity. Such a process of harmonization could be undertaken in the Drafting Committee or by coordination among the Special Rapporteurs for the topics concerned.

With regard to future work on the topic, the Special Rapporteur had stated that the next, and possibly final, report would provide proposals on how to proceed with the question of an illustrative list of *jus cogens* norms. Consideration of that question would be welcome, as the idea of producing such a list had received support from States and Commission members. The Special Rapporteur could build on the oft-cited list of the most frequently cited candidates for the status of *jus cogens* produced by the Study Group on fragmentation of international law and the non-exhaustive list set out in the commentary to

the articles on State responsibility. He should make it clear that the prospective list was not exhaustive and could offer illustrative examples and provide context for the identification of new *jus cogens* norms in the future. Since the agreement of States on what norms should be included in the illustrative list was of particular importance, the Special Rapporteur should aim to accommodate their views on that matter as far as possible.

The next report would also address the question of regional *jus cogens*, which had attracted less support from States in the Sixth Committee, but the existence of which had been recognized in international case law and in regional legal systems. The Special Rapporteur could study how the existence of regional *jus cogens* norms related to the universal application of *jus cogens* norms. Lastly, miscellaneous issues raised by the Commission and States would be considered in the next report. Those issues could, in his view, include the question of whether there existed invalid amnesties and invalid statutes of limitations for crimes prohibited by *jus cogens*.

In conclusion, he wished to thank the Special Rapporteur once more for his excellent, thorough and analytical third report on a challenging topic. Although some of the proposed draft conclusions were more controversial than others, they should all, in his opinion, be referred to the Drafting Committee, which had always found solutions to complex issues. In any case, he was confident that the final outcome of the Commission's work on the topic would represent a valuable part of its body of work.

Mr. Huang said that he almost fully shared the views expressed by Mr. Nolte and Mr. Rajput, who had made convincing comments on, in particular, draft conclusions 14, 17, 22 and 23. Having thanked the Special Rapporteur for his report, he said that, before commenting on the topic, he wished to stress the need for the Commission to avoid, to the extent possible, the overlapping of agenda items.

Draft conclusions 10 to 14, pertaining to treaties that were in conflict with peremptory norms, seemed to have structural flaws. Draft conclusions 10 and 11 were based on articles 53 and 64 of the 1969 Vienna Convention, which were placed in two different sections in part V of the Convention: article 53 was in section 2 (Invalidity of treaties), while article 64 was in section 3 (Termination and suspension of the operation of treaties). In both draft conclusions 10 and 11, the invalidity of treaties was addressed in paragraph 1 and the termination of treaties in paragraph 2, while paragraph 3 of draft conclusion 10 dealt with the interpretation of treaties. Since the taxonomic method used in the 1969 Vienna Convention had been well thought out and conformed to general legal logic, it would be best, in his opinion, not to alter that structure in the draft conclusions, so as to avoid the possibility of confusion. He wondered whether paragraph 1 of both draft conclusions could be combined into one draft conclusion, with the respective second paragraphs forming another draft conclusion and paragraph 3 of draft conclusion 10 serving as a separate draft conclusion.

With regard to paragraph 1 of draft conclusion 10, he agreed with the Special Rapporteur's methodology of basing his research on the framework of article 53 of the 1969 Vienna Convention. However, there was a discrepancy between the Convention and the wording of the draft conclusion. He recommended that the terms already established in the Convention should be used because they had been accepted by the majority of countries.

There was also a terminology issue with regard to draft conclusion 11: the words "severability" and "severed" were used in the draft conclusion itself, while the word "severable" appeared in the related sections of the report. Those terms did not tally with the concept of separation used in article 44 of the 1969 Vienna Convention. As indicated in footnote 105 of the report, the term used in the Convention was "separation". As he had stated with regard to draft conclusion 10, terms different from those in the Convention should not be used.

Draft conclusion 12, on the elimination of consequences of acts performed in reliance of an invalid treaty, corresponded with the relevant provisions of article 71 of the 1969 Vienna Convention. However, he wondered why articles 69 and 70, which also dealt with the consequences of the invalidity and termination of treaties, were not mentioned; other members had also voiced perplexity on that score. It would be appreciated if the

Special Rapporteur could clarify whether articles 69 and 70 were applicable as general provisions to the consequences of a conflict of a treaty with peremptory norms.

On draft conclusion 13, it was stated in the report that a reservation to a treaty provision that reflected a peremptory norm of general international law did not affect the binding nature of that norm because the treaty provision to which a reservation was being formulated and the *jus cogens* norm in question had a separate existence, a point that he did not dispute. However, he had noted some discrepancies in the terms used in some of the footnotes in the report concerning the Guide to Practice on Reservations to Treaties.

In his view, the recommended procedure regarding settlement of disputes set out in draft conclusion 14 was flawed. The 1969 Vienna Convention did not provide that a dispute concerning the application or interpretation of article 53 or article 64 should be referred immediately to the International Court of Justice for a decision; rather, under article 66, the possibility of recourse to the Court existed only when the dispute was not resolved within a given time frame following the application of the relevant provision of article 65. However, that step was completely omitted from the draft conclusion, which provided directly that any dispute should be submitted to the International Court of Justice. The relationship between articles 65 and 66 was wisely mentioned in paragraphs 46 and 47 of the report; in his view, it would have been appropriate to add the relevant wording from article 65 to the draft conclusion. Respect for the principle of State consent was an issue of significant concern to many States. Any hasty referral of a dispute to the International Court of Justice would fail to accommodate that concern and would indirectly deprive the parties concerned of their right to resolve disputes through negotiations and other means. He fully agreed with Mr. Rajput, who had questioned the need for the draft conclusion.

Draft conclusion 17, in his view, presented serious problems. First, the resolutions of the Security Council were not the only binding resolutions adopted by international organizations; hence, it seemed unnecessary to single out Security Council resolutions and to stress conflicts between them and *jus cogens*. In addition, neither the report nor the text of the draft conclusion contained a clear statement of the legal consequences of a conflict between a Security Council resolution and a peremptory norm: it was not specified whether the whole resolution was rendered invalid or whether only the relevant provisions were affected. According to the analysis in the report pertaining to draft conclusion 11, a treaty that was in conflict with a peremptory norm was invalid in whole; on that basis, it seemed that any conflict between a Security Council resolution and a peremptory norm would render the resolution invalid in whole. Yet there was quite a difference between Security Council resolutions and treaties. The idea that it was appropriate to directly apply the relevant articles of the 1969 Vienna Convention in the case of Security Council resolutions was not well supported.

Draft conclusion 17 also touched upon the issue of responsibility of international organizations, which the Commission had debated in the past: the Special Rapporteur for that topic had submitted eight reports and, after many years of effort, the Commission had eventually adopted the articles on the responsibility of international organizations. The Commission's outputs on previously discussed topics were valuable intellectual assets and could serve as a reference for discussions on other topics. The articles in question clearly provided that international organizations could independently assume international responsibility as subjects of international law; they also provided for institutional arrangements on specific issues in that regard. The draft conclusion referred to the possibility that international organizations, including the United Nations, might adopt binding resolutions that conflicted with peremptory norms of general international law. In such a case, the issue of the responsibility of those organizations might arise. In the report, however, only the issue of State responsibility was discussed.

Draft conclusion 18 dealt with the relationship between *jus cogens* and obligations *erga omnes*. The articles on State responsibility, however, made no mention of obligations *erga omnes*.

Draft conclusion 19 pertained to the effects of *jus cogens* on circumstances precluding the wrongfulness of an act. Paragraph 1 reflected the content of article 26 of the

articles on State responsibility, to which he had no objection. However, the circumstances described in paragraph 2 required further careful consideration.

Draft conclusions 20 and 21 were basically consistent with articles 40 and 41 of the articles on State responsibility; however, draft conclusion 21 referred to a "breach" rather than a "serious breach" of a peremptory norm. In the report, the Special Rapporteur gave an explanation of the discrepancy: "While the duty to cooperate to bring to an end situations created by a breach requires positive concerted, perhaps onerous, action, the duty not to recognize, aid or assist, merely requires State to abstain from conduct." Clearly, the threshold with respect to the duty not to recognize, aid or assist was quite low. Yet it was also obvious that the same situation had existed when the articles on State responsibility had been drafted; nonetheless, the words "serious breach", representing the higher threshold, had been used. It should be mentioned that, in discussing the duty to cooperate, the Special Rapporteur cited the advisory opinion of the International Court of Justice on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and the Court's South West Africa* cases to demonstrate that States must cooperate to bring to an end through lawful means any serious breach of *jus cogens*. Since the breach in both those cases had been serious, it was inappropriate to cite them as arguments for the duty not to recognize or render assistance in the case of a breach that was not qualified as serious. In his view, draft conclusion 21 should be aligned as closely as possible with the relevant content of the articles on State responsibility.

Draft conclusions 22 and 23, in particular 23, had provoked considerable controversy in the Commission. Several members, himself included, were opposed to referring them to the Drafting Committee.

With regard to draft conclusion 22, the report contained a discussion of specific State practice regarding several categories of international offence. In order to draw the conclusion set out in paragraph 1, it would have to be assumed that States exercised jurisdiction over the offences in question specifically because they violated *jus cogens*. However, that assumption could not be substantiated simply by proving that States did in fact exercise jurisdiction over such offences: such State practice might be based on obligations under certain treaties or on domestic laws. For instance, States often established jurisdiction over genocide and war crimes on the basis of the Convention on the Prevention and Punishment of the Crime of Genocide or the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). Examples of domestic laws were also easily found. In China, article 247 of the Criminal Code established the crimes of extracting confession under torture and obtaining evidence by violence, while article 248 defined the crime of maltreatment of prisoners. The essence of those articles was to prohibit torture, but it seemed that the basis for their inclusion in the Criminal Code was not that the prohibition of torture was part of *jus cogens*: back in 1979, when the prohibition of extracting confession under torture had been included in the Criminal Code, the 1969 Vienna Convention had not yet been in effect, and the definition of torture had not yet been widely recognized. He therefore believed that the conclusion on State practice in the report was defective.

Even if the draft conclusion were eventually adopted, there would still be a question mark over whether States could implement it. For instance, although 104 States had domestic legislation on crimes against humanity, nearly 100 States did not. In addition, the range of offences involved in the draft conclusion might be very broad, but the Special Rapporteur did not specify what those offences were or how many there were. More importantly, *jus cogens* was a set of developing and evolving norms of international law. It was very likely that there would be new offences prohibited by *jus cogens* in the future, and more offences which, though prohibited by *jus cogens*, were not included in domestic laws. That would certainly make it more difficult to implement the provision.

Regarding draft conclusion 23, the issue that it addressed was being considered under the topic of immunity of State officials from foreign criminal jurisdiction; there was therefore no need to discuss it in parallel under the current topic.

The Special Rapporteur attempted to use draft article 7 of the draft articles on immunity to back the draft conclusion. That indeed went too far. It was well known to all

that draft article 7 had provoked major controversy both in the Commission and in the Sixth Committee. Not only did it afford no support to the draft conclusion, but also invoking it in that context would inevitably trigger a new round of debate in the Commission.

As to the Special Rapporteur's analysis concerning the immunity issue, he believed that there was no need to have a lengthy debate at the current juncture, as there had already been an in-depth discussion, under the topic of immunity, of the basic legal issues — the immunity of the troika of Head of State, Head of Government and minister for foreign affairs; immunity *ratione personae* versus *ratione materiae*; immunity from criminal versus civil jurisdiction; and the immunity of officials versus diplomatic immunity — and of the value of cases such as the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case of the International Court of Justice.

He was particularly surprised that the scope of the exceptions to immunity provided for in draft conclusion 23 went far beyond draft article 7 of the draft articles on immunity, which itself was still the subject of controversy. Article 1 of the draft articles expressly stipulated: "The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State." Draft conclusion 23, on the other hand, contained no such provision. Also, draft article 7 mentioned only six international offences, with a reference to a list of treaties set out in the annex to the draft articles that would facilitate understanding of the definitions of those offences. By contrast, draft conclusion 23 referred to "any offence prohibited by … *jus cogens*" in general terms, without any limitations being set or explanations given. He reiterated his view that draft article 7 was not acceptable and said that, in comparison, draft conclusion 23 was even more unacceptable. He therefore objected to referring that draft conclusion to the Drafting Committee.

Ms. Oral, having thanked the Special Rapporteur for his well-researched and insightful report, said that *jus cogens* was indeed one of the more complex, interesting and even enigmatic topics in international law; the key issue of its legal effects in particular had generated much thought and debate. Indeed, she appreciated the rich exchange of views among members, which had but scratched the surface of the subject. Mr. Murase might have been right when he had stated that perhaps a smaller number of draft conclusions would have allowed for even more in-depth consideration of the intricate matters of international law involved in the topic. However, in her view, the report and the proposed draft conclusions constituted a valuable contribution to the Commission's work.

Overall, she agreed with Mr. Šturma and others that the report was well documented and comprehensive and that it contained rich and thorough analysis of the relevant State practice, the case law of international and national courts and academic literature. She also agreed with Mr. Zagaynov that the topic required careful handling, since it would inevitably involve political considerations. Her one critical comment concerned the organization of the report: she shared the view of Mr. Park, Mr. Murphy and others that the 14 draft conclusions could perhaps have been structured in a more coherent, concise and effective way. Moreover, the structure of the report did not follow the order of the draft conclusions, which made it a little more difficult to analyse the Special Rapporteur's substantive grounds for each of the draft conclusions. A summary at the end of each section would have been helpful to the reader.

In general, she accepted the practical and cautious methodology used by the Special Rapporteur, who at the same time provided a measured level of clarification, in particular with regard to the legal consequences of peremptory norms for sources of international law beyond treaties. The commentaries would be an essential component of the Commission's work on the topic in that they would provide the necessary additional clarifications regarding the draft conclusions.

She agreed with draft conclusion 10, which was based directly on articles 53 and 64 of the 1969 Vienna Convention, although paragraphs 1 and 2 contained additional elements that were not taken from those articles: under paragraph 1, a treaty that was void because it was in conflict with a norm of *jus cogens* at the time of its conclusion did not create any

rights or obligations; similarly, under paragraph 2, parties to a treaty that became void were released from any further obligation to perform the treaty. Since the text was a set of draft conclusions aimed at providing clarification rather than a set of draft articles, she was comfortable with those additions. Indeed, she would go so far as to suggest that the term "*ab initio*" should be added after the word "void" in paragraph 1, in order to emphasize that a treaty would be absolutely invalid if it conflicted with a peremptory norm at the time of its conclusion. The use of the term "*ab initio*" would also help to distinguish paragraph 1 from paragraph 2, under which an existing treaty was not void *ab initio* but rather became invalid from the time of the emergence of a new peremptory norm. She also agreed with Mr. Zagaynov that the terminology used should be consistent — either the term "void" or the term "invalid" should be used to describe the consequences of *jus cogens* in relation to treaties — and she appreciated the learned explanation provided by Mr. Rajput in that regard.

In addition, she supported the inclusion of paragraph 3 of the draft conclusion, which was aimed at providing greater protection for the *pacta sunt servanda* principle by allowing courts to interpret a treaty in a way that rendered it consistent with a peremptory norm of international law and by ensuring the stability of treaties. However, she wished to place on the record her disagreement with the reference in the report to the Treaty of Guarantee between Cyprus, Greece, Turkey and the United Kingdom as support for paragraph 3. The action by Turkey to protect the Turkish Cypriots had been taken under the Treaty, in accordance with the legal rights and obligations of Turkey as a guarantor Power in Cyprus, following the attempted coup on the island incited by the junta in Greece with the aim of achieving *enosis*, or union with Greece. Thus the intervention by Turkey had not, in her opinion, been unlawful and had not raised any issues relating to *jus cogens*.

Turning to draft conclusion 11, she said that articles 53 and 64 of the 1969 Vienna Convention contained no reference, either express or implicit, to severability. A *stricto sensu* interpretation of those articles led to the conclusion that a conflict with a peremptory norm would affect the validity of the treaty as a whole. Moreover, article 44, on separability of treaty provisions, expressly stated that there could be no separation of the provisions of treaties falling under, *inter alia*, article 53. However, the Special Rapporteur rightly pointed out that no mention was made in article 44 of article 64, which suggested that, for cases falling under article 64, severability was possible. That understanding was further supported by the commentary to article 61 of the draft articles on the law of treaties. Consequently, she agreed with the Special Rapporteur's conclusion in paragraph 39 of the report that, in the case of existing treaties that conflicted with a new norm of *jus cogens*, severability was an option and was consistent with the 1969 Vienna Convention. Nonetheless, she was somewhat concerned that insufficient guidance was provided on the proper interpretation of the three subparagraphs from article 44 (3) incorporated into paragraph 2 of the draft conclusion. For instance, under subparagraph (c), she wondered in what circumstances the continued performance of the remainder of the treaty would be considered "unjust" and, under subparagraph (b), what would constitute "an essential basis for the conclusion of the treaty". She encouraged the Special Rapporteur to provide more examples clarifying the use of those terms in the commentary.

Under paragraph 1 of draft conclusion 12, parties to a treaty that was in conflict with a *jus cogens* norm at the time of its conclusion had a legal obligation to eliminate the consequences of any act performed in reliance of the treaty. That provision was based on article 71 (1) of the 1969 Vienna Convention, which expressly applied to treaties that were in conflict with peremptory norms at the time of conclusion. However, as had been pointed out by other members, the paragraph in its current form did not fully reflect article 71 (1), in particular because the phrase "as far as possible" was omitted. The paragraph should be redrafted so as to be consistent with article 71 (1); otherwise, an explanation would have to be given in the commentary, as the provision in its current form might be read over-expansively.

Draft conclusion 13 was basically a restatement of the relevant guideline in the Commission's Guide to Practice on Reservations to Treaties; she therefore had no comments on it.

Turning to draft conclusion 14, which was based on article 66 of the 1969 Vienna Convention, she said that procedural safeguards regarding disputes were essential, given that the consequence of a conflict between a treaty and a peremptory norm was termination of the treaty. In paragraph 50 of the report, the Special Rapporteur raised two issues regarding article 66 (a): first, it was not clear who might approach the International Court of Justice and, secondly, it was not clear whether States not parties to the 1969 Vienna Convention might invoke the provision. She had read c... fully the Special Rapporteur's analysis in paragraph 53 of the report, where he drew a fine line between the definition of a party under the 1969 Vienna Convention and the wording of article 66 (a). She had also considered his concerns, set out in paragraph 54, about the risks associated with excluding third parties from access to the procedure available under article 66 (a). After careful reflection, and appreciating the risk of unilateral declarations of invalidity of a treaty on account of conflict with *jus cogens*, as highlighted by the Special Rapporteur, she agreed with the inclusion of a recommendation for a safeguard procedure parallel to that provided for in article 66, as set out in the draft conclusion. She also found interesting Mr. Nolte's proposals concerning a broader approach to procedural safeguards — specifically, that the core procedure set out in article 65 should apply to all sources of law, not only treaty obligations, and that it should be reflected in a new paragraph in each of draft conclusions 14 to 17 or in a new general draft conclusion on procedure — and would support further discussion of that issue by the Drafting Committee.

She agreed in principle with draft conclusion 15, but noted that the commentary thereto would be important and should be aligned with the Commission's work on identification of customary international law. She also agreed with paragraph 3 on the persistent objector rule.

She supported draft conclusion 16 and had no additional comments on it.

With regard to draft conclusion 17, she agreed with the principle that even binding resolutions of the Security Council could not be in conflict with norms of *jus cogens*. The Special Rapporteur had pointed out the lack of actual practice in that regard and also the remote likelihood of such a resolution being adopted. On the question of how the draft conclusion would be implemented, it would be necessary in the commentary to delve into the practical, including procedural, considerations.

She agreed with the principle, set out in draft conclusion 18 and explained in paragraphs 103 to 111 of the report, that peremptory norms of *jus cogens* created obligations *erga omnes*. She also noted that the reverse was not true: not all obligations *erga omnes* were necessarily norms of a *jus cogens* nature. However, as stated in the report, obligations *erga omnes* and jurisdiction were treated as separate issues in judgments of the International Court of Justice.

The elaboration of the relationship between peremptory norms and *erga omnes* obligations was, in her opinion, one of the significant contributions of the draft conclusions. While an obligation *erga omnes* did not necessarily provide independent grounds for jurisdiction, it did provide standing to non-injured States, as shown in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* before the International Court of Justice, in which the Court had found that Belgium, despite the absence of any injury to it, had standing to bring an action against Senegal under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for failure to prosecute or extradite a defendant for crimes of torture.

However, the formulation of the draft conclusion could, in her opinion, be more robust; the Special Rapporteur had taken a rather conservative approach by stating that a breach of an obligation *erga omnes* "concerns" all States. By contrast, in article 48 (1) (a) of the articles on State responsibility, the "collective interest" of States was specifically identified. In her view, the draft conclusion should provide that a breach of an obligation *erga omnes* was a breach that affected the collective interests of States and allowed any State to bring a judicial action against the State in breach. She was also open to the different formulations proposed by Ms. Galvão Teles. Moreover, she agreed that the draft conclusion should be consistent with the articles on State responsibility in that the word "breach" should be qualified by the word "serious".

Draft conclusions 19 to 21 were based directly on the articles on State responsibility and, while they thus restated existing output of the Commission, she agreed with Mr. Šturma's comment that the Commission's previous codification work in that area was relevant to the current topic. She also agreed with his view that it was important to address all the legal consequences of peremptory norms of general international law; in that context, she supported draft conclusions 19 to 21, as well as draft conclusion 13 on the effects of peremptory norms on reservations to treaties.

With regard to draft conclusion 22, there was a rich supply of relevant treaty law and State practice, which the Special Rapporteur had detailed in paragraphs 113 to 120 of the report. It was important to make a distinction between the duty to prosecute crimes prohibited by *jus cogens* and the question of whether a basis for jurisdiction over such crimes existed. The Special Rapporteur had taken that distinction into account in paragraph 1 of the draft conclusion, under which a State's duty to exercise jurisdiction was limited to offences committed by nationals of that State or on the territory under its jurisdiction; under paragraph 2 the door was implicitly left open to the exercise of universal jurisdiction under the State's national law.

On draft conclusion 23, she had already stated her support for the exception to immunity *ratione materiae* during the debate at the sixty-ninth session on draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction. The main questions that she, along with other members, wished to raise pertained to the relationship between the draft conclusion and the Commission's ongoing work on the topic of immunity, and the concerns regarding crimes against humanity raised by Mr. Murphy, who was the Special Rapporteur for that topic. She agreed with Mr. Hassouna that it was important for the Commission to maintain consistency in its work across different topics. In her view, the draft conclusion should be carefully assessed by the Drafting Committee in the context of the Commission's ongoing work on other topics so as not to prejudice that work and to ensure internal consistency. The suggestion by Mr. Jalloh, Mr. Vázquez-Bermúdez and Ms. Galvão Teles that the draft conclusion should be held in abeyance until the Commission had completed its work on the topic of immunity merited consideration.

She recommended that all the proposed draft conclusions should be referred to the Drafting Committee.

Mr. Reinisch said that he wished to congratulate the Special Rapporteur on his rich and insightful report focusing on the intricate and highly relevant question of effects and consequences of *jus cogens*.

The proposed draft conclusions largely reflected the current state of the law as laid down in the 1969 Vienna Convention and corresponding customary international law. That was particularly true of draft conclusion 10. At first sight, paragraph 2 of the draft conclusion, which dealt with the emergence of a new peremptory norm of general international law with which a treaty already in force conflicted, appeared to be a necessary consequence of the general principle of invalidation of a treaty owing to conflicting *jus cogens*. However, without further clarification, the application of that rule was liable to pose considerable difficulty if it was the decisive factor in a case brought before a domestic or international court. The development of a peremptory norm of general international law was a lengthy process requiring an indeterminate amount of time. It could therefore be difficult to ascertain *ex post* at what precise point in time a treaty rule had become void owing to a conflict with a newly emerged rule of a peremptory nature. Admittedly, however, a similar level of uncertainty already existed under article 64 of the 1969 Vienna Convention. In that respect, therefore, the application of draft conclusion 10, as it stood, would not differ substantially from the application of existing treaty law. Meanwhile, the wording of the second sentence of paragraph 2 — "[p]arties to such a treaty are released from any further obligation to perform in terms of the treaty" — had been wisely chosen by the Special Rapporteur, in that the inclusion of the word "further" clearly indicated only an *ex nunc* effect and barred any interpretation to the contrary.

On the issue of severability, draft conclusion 11 provided for a system that was similar to that established under the 1969 Vienna Convention. Under the proposed text, treaties that conflicted with a peremptory norm of general international law at the time of

their conclusion were invalid as a whole, whereas, in the case of the emergence of a new peremptory norm subsequent to the treaty's conclusion, those provisions not affected by the new norm remained in force, provided that certain conditions were met. In that context, he concurred with Mr. Nolte and Mr. Rajput that more detailed consideration should be given to the specific justification for applying different legal consequences in those situations; the *travaux préparatoires* of the 1969 Vienna Convention contained hardly any clear indication on that score. In paragraph (3) of the Commission's commentary to article 61 of the draft articles on the law of treaties (*Yearbook of the International Law Commission* (1966), vol. II, p. 261), it was merely stated that "although the Commission did not think that the principle of separability is appropriate when a treaty is void *ab initio* under article 50 by reason of an existing rule of *jus cogens*, it felt that different considerations apply in the case of a treaty which was entirely valid when concluded but is now found with respect to some of its provisions to conflict with a newly established rule of *jus cogens*. If those provisions can properly be regarded as severable from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid."

With regard to article 44 (5) of the 1969 Vienna Convention, which ruled out severability in the case of treaties in conflict with existing *jus cogens*, a view had been widely put forward that full invalidation of a treaty was warranted as a "sanction in the interest of international society" against impermissible conduct of States. Such a sanction would not be necessary in the case of a treaty that conflicted with a new peremptory norm: States might not have been able, at the time of concluding the treaty, to foresee the development of such a norm. At any rate, the severability of provisions that violated new *jus cogens* norms reinforced the proposition that the scope of invalidation was generally narrow. After all, article 71 (2) (b) of the 1969 Vienna Convention provided only for an *ex nunc* effect, so that prior rights and obligations might be maintained to the extent that their maintenance was not in itself in conflict with the new peremptory norm of general international law. However, the real issue was whether the strict rule set out in article 44 (5) had in fact been followed in State practice and should be maintained.

The wording of draft conclusion 13, paragraph 2 — "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*)" — differed slightly from the wording set out in paragraph 76 (b) of the report, which read: "a reservation that seeks to exclude or modify the legal effects of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*) is invalid". The latter wording was to be preferred because the idea that such a reservation was considered invalid expressed more clearly the consequences of such a reservation for the applicability of the treaty to the reserving party. In paragraph 75 of the report, it was stated that such a reservation was null and void and did not affect the applicability of the treaty, in accordance with the Guide to Practice on Reservations to Treaties. It might be helpful to note in the commentary that there had also been some academic discussion on that issue.

Draft conclusion 14 largely corresponded to article 66 of the 1969 Vienna Convention, a provision that, thus far, had never been invoked in practice. Under paragraph 1 of the draft conclusion, as under article 66, the International Court of Justice would have jurisdiction over disputes concerning an alleged conflict between a treaty and a peremptory norm, unless the parties opted for arbitration instead. However, it was doubtful whether it should really fall to arbitral tribunals to address fundamental issues of international law such as the identification of peremptory norms. The settlement of disputes by *ad hoc* tribunals always entailed a higher risk of inconsistency than adjudication, even if only because of variations in the constitution of panels. Dispersing competence across such *ad hoc* bodies could run counter to the aim of consolidating the international legal system and achieving legal certainty. For the sake of a clear hierarchy of norms, it might therefore be preferable to entrust only the International Court of Justice with the task of settling disputes concerning the invalidation of treaties owing to conflicting peremptory norms of general international law. Hence, the Commission should consider the possibility of omitting the phrase "unless the parties to the dispute agree to submit the dispute to arbitration".

Turning to draft conclusion 17, he noted that some members had criticized the specific reference to and focus on Security Council resolutions. In his view, however, the

formulation chosen by the Special Rapporteur, which contained a generic reference to "[b]inding resolutions of international organizations, including those of the Security Council of the United Nations", was sufficiently broad to apply to all international organizations, while at the same time highlighting the fact that, in practice, what was really of concern was resolutions of the Security Council under Chapter VII of the Charter that might conflict with *jus cogens*.

In his report, the Special Rapporteur also provided a very helpful overview of international and domestic judicial practice that threw light on the relationship between *jus cogens* and *erga omnes* obligations. Draft conclusion 18 reflected the summary in the report, in accordance with which peremptory norms generally entailed obligations *erga omnes*, whereas not all obligations *erga omnes* qualified as peremptory norms. That view had been widely, though not unequivocally, recognized and accepted in academic writings. The International Court of Justice had also made it clear, in its judgment in the case concerning *East Timor (Portugal v. Australia)*, that a legal interest of a third State in another State's compliance with an international *erga omnes* obligation did not in itself provide a basis for the Court's jurisdiction. The Special Rapporteur had rightly taken account of that *dictum* in paragraph 2 of draft conclusion 14.

It was unclear from the wording of draft conclusion 18 whether it was the breach only of those *erga omnes* obligations established by peremptory norms that concerned all States or whether the breach of *erga omnes* obligations as a whole concerned all States. In paragraph 110 of the report, it was stated that the *erga omnes* character of *jus cogens* explained the interest of third States in a wrongful act committed by one State against another. That appeared to suggest that the former interpretation applied. In that case, it would be helpful to explain in the commentary what was meant by the expressions "concerns all States" and "the interest of third States" with regard to obligations *erga omnes*.

With regard to acts or omissions that third States were permitted or even obliged to undertake as a result of a breach by another State of a peremptory norm of general international law, proposed draft conclusions 20 to 23 included a duty of cooperation and of non-recognition, as well as a duty to exercise domestic jurisdiction, in certain cases even by lifting immunity. It was certainly important to address consequences of *jus cogens* other than the invalidation of treaties, because the invalidation of a treaty constituted only a change in a legal situation and did not necessarily prevent States from undertaking actions inconsistent with a peremptory norm. However, it must be kept in mind that many of those consequences might overlap with issues dealt with in the context of other topics on the Commission's agenda; they should thus be addressed carefully so as to avoid inconsistency.

The duty to cooperate and the duty not to recognize or render assistance, set out in draft conclusions 20 and 21, respectively, were relatively uncontroversial; however, draft conclusions 22 and 23 appeared more problematic. While there was little question that a State had a duty to exercise jurisdiction over crimes prohibited by *jus cogens* that were committed by its nationals or on its territory, as provided for in paragraph 1 of draft conclusion 22, paragraph 2 of the draft conclusion was probably more controversial and might even be misleading. It provided that paragraph 1 did not preclude the establishment of jurisdiction on any other ground as permitted under its national law; thus it appeared to hint at the exercise of universal jurisdiction to prosecute crimes prohibited by peremptory norms of international law. However, as demonstrated in paragraphs 115 to 120 of the report, there was currently no clear consensus in international law as to whether universal jurisdiction was allowed, other than under a specific convention that stipulated it. The wording of paragraph 2 also suggested that other grounds as permitted under national law currently existed; moreover, it did not include the expression "in accordance with international law", which had wisely been included in the summary of the corresponding discussion set out in paragraph 132 (b) of the report. It would be advisable to include that expression in the draft conclusion so as to acknowledge the current ambiguous state of the law, rather than permitting countries to act solely on the basis of national law.

Turning to draft conclusion 23, he said that the proposition set out in paragraph 1 — that a person's official position was irrelevant to his or her criminal responsibility — seemed to be widely accepted nowadays. However, paragraph 2, on the non-applicability of

immunity *ratione materiae*, appeared highly problematic, in particular because it was being dealt with in the context of the Commission's deliberations on the topic of immunity of State officials from foreign criminal jurisdiction. While that debate was ongoing, he preferred to abstain from addressing the issue in the context of the current topic.

The issue of countermeasures was not mentioned in the report. A discussion thereof, and potentially an explicit provision concerning the right of third States to take countermeasures against a State that was in breach of an obligation with *erga omnes* effects, could prove to be a meaningful addition to the Commission's work. The imposition of countermeasures as a consequence of breaches of *erga omnes* obligations — which, as mentioned earlier, included all peremptory norms of general international law — was explicitly provided for in the 2005 resolution of the Institute of International Law on obligations *erga omnes* in international law, article 5 (c) of which read: "Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed … are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach."

In conclusion, he expressed his sincere thanks to the Special Rapporteur for his excellent and thought-provoking report and said that he supported in principle the discussion of the draft conclusions in the Drafting Committee.

The meeting rose at 5.35 p.m.